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Charles Hsin and Optech Limited

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Civil No. 07-4762-PJH

Plaintiff,

v.

CHARLES CATHCART, SCOTT  
CATHCART, YURIJ DEBEVC, a/k/a YURI  
DEBEVC, ROBERT NAGY, DERIVUM  
CAPITAL (USA), INC., VERIDIA  
SOLUTIONS, OPTECH LIMITED,  
CHIHSIU HSIN, a/k/a CHARLES HSIN,  
FRANKLIN THOMASON

Defendants.

**DECLARATION OF EDWARD O.  
C. ORD IN SUPPORT OF THE  
DEFENDANTS HSIN AND  
OPTECH LIMITED'S  
ADMINISTRATIVE MOTION  
PURSUANT TO LOCAL RULE 7-11  
TO CONTINUE THE ENTIRE  
CASE MANAGEMENT SCHEDULE  
ORDER**

I, EDWARD ORD, declare as follows:

1. I am a member in good standing of the Bar of this Court.

2. Here are the relevant procedural facts to date:

a. The above civil action was filed on September 17, 2007.

b. Very late in the proceedings this Court ordered the First Amended

Complaint to be filed on April 18, 2008. The First Amended Complaint was filed on April 23,

1 2008. The Moving Defendants, Charles Hsin and Optech Limited ("Moving Defendants" or  
2 "Defendants"), were served the First Amended Complaint on May 13, 2008.

3 c. The Court had the following deadlines in effect prior to service of the  
4 First Amended Complaint on Defendants pursuant to its Civil Minute Order of January 3, 2008  
5 (other than item 1):

- 6 1. The last day to amend pleadings is June 5, 2008.
- 7 2. The cut-off date for the designation of experts is August 20, 2008.
- 8 3. The cut-off date for non-expert discovery is September 3, 2008.
- 9 4. The cut-off date for expert discovery is October 1, 2008.
5. Dispositive motions must be heard by November 19, 2008.
6. Trial is set for March 23, 2009.

10 d. Again, the Moving Defendants were joined as parties by virtue of the  
11 filing of the amended complaint on April 23, 2008. After a reasonable extension of times  
12 approved by the Court, the Defendants have moved expeditiously by filing a series of  
13 meritorious, good faith non-dispositive motions. The Defendants have not been able to file  
14 dispositive motions on technical grounds due to the inability to obtain certain declarations to  
15 date.  
16

17 e. The motions are set for hearing on September 10, 2008.

18 f. The Defendants are not required to file an answer until ten (10) days  
19 after the above motions are decided.  
20

21 g. The deadline of June 5, 2008 cutting off the right to amend pleadings had  
22 already run before the Defendants had even filed the first motion on June 15, 2008. The second  
23 deadline on the designation of experts ran on August 20, 2008. Yet, the good faith motions  
24 have not even been heard. The third discovery deadline cutting off non-expert discovery will  
25 have run before the Defendants are required to answer the complaint on September 3, 2008.  
26

1           3.       The Defendants and their counsel have and continued to be severely prejudiced  
2 by the continued enforcement of the current case management order entered near the beginning  
3 of this case that gave the U.S. and the other defendants seven additional months that  
4 Defendants CHARLES HSIN and OPTECH LIMITED (collectively "Defendants") are being  
5 denied.

6           4.       The Defendants received initial disclosures and, recently, a small part of the  
7 discovery from the U.S. that have been provided to the other defendants much earlier. Yet,  
8 prejudicial cutoffs with respect to the Defendants have resulted.

9           5.       The Defendants have drafted, very meritorious, dispositive motions based on  
10 mootness, certain constitutional grounds, estoppel, other new grounds and some narrow  
11 jurisdictional grounds. These motions will raise new issues and grounds in this civil action.

12          6.       These motions have not been filed because the Defendants have been delayed  
13 by promised, but not yet provided, needed declarations for various reasons. We anticipate this  
14 problem will be cured shortly so these motions can be filed with this Court this month.

15          7.       Extensive discovery will be needed into the ways and means in which the IRS  
16 initially obtained the information about the operation of the loan operation now complained of  
17 in this civil action. The discovery may result in the development of a basis for suppression  
18 and/or exclusion of evidence. In fact, grounds may result in the exclusion of almost all of the  
19 evidence presently relied on by the United States in this civil action. This will have to be  
20 developed by discovery.

21          8.       Extensive depositions of numerous IRS officials and other persons will need to  
22 be taken in any event with respect to the issues framed in this case.

23          9.       Under the current enforcement of the scheduling order, Defendants cannot  
24 evaluate the small part of discovery produced recently and discovery that have yet to be  
25 provided from the U.S. and then engage in the necessary discovery in any area or based on  
26 helpful evidence that is buried in the IRS' investigative files that is later discovered.

10. Defendants are severely prejudiced because they have not been able to perform discovery or have time to select experts after discovery is to be completed. Defendants will continue to incur prejudice.

11. Tax cases involving the 90% Stock Loan are winding through the Federal Courts. The Court will have the benefit of these decisions if the continuances are granted.

12. One Superior Court of California has previously granted summary judgment that the marketing of the loan transactions, including the 90% Stock Loan transaction in issue in this civil action, were not the sale of securities but bona fide loans. This definitely impeaches the complaint that the loan transactions are false.

13. In light of the above, the following factors and our compliance with these factors should be considered by the Court:

a. the extent of Defendants' diligence in their efforts to ready their defense prior to the date set for hearing,

b. the likelihood that the need for a continuance could have been met if the continuance had been granted,

c. the extent to which granting the continuance would have inconvenienced the court and the opposing party, including its witnesses, and

d. the extent to which the Defendants might have suffered harm.  
The The Moving Defendants were joined as parties on April 18, 2008 and were served on May 13, 2008.

14. The Defendants were joined as parties on April 18, 2008 and were served on May 13, 2008. After being served, the Defendants diligently exercised their due process rights under the Federal Rules of Civil Procedure ("FRCP") by filing good faith non-dispositive motions, including motions for more specific pleadings. These motions are currently under consideration by this Court. However, by the time these motions are decided, the above crucial deadlines will have already passed through no fault of the Defendants. Despite any vigorous

1 due diligence, the election of the U.S. to bring in the Defendants so late into the case defeats  
2 the more than sufficient due diligence the Defendants could have and did exercise.

3 14. The Defendants believe that it is necessary for this Court to decide on the  
4 meritorious non-dispositive motions so the Defendants can answer the specific pleadings under  
5 the rules. The U.S. elected to file a vague, conclusory complaint which lumped the defendants  
6 together. The complaint is currently so vague that FRCP 9(b) and 12(e) motions were  
7 necessary.

8 15. After the proper disclosures are made by the Plaintiff, the Defendants will  
9 request documents and conduct interrogatories. Then, the Defendants will take depositions of  
10 government officials and third party witnesses,<sup>1</sup> conduct discovery and research, and select the  
11 needed experts after discovery. However, the Defendants are currently barred from exercising  
12 their rights under the FRCP.

13 16. The Defendants plan to file dispositive motions that present new meritorious  
14 issues, including constitutional issues, issues relating to the Administrative Procedures Act,  
15 estoppel issues, and mootness issues, which the Defendants wish to pursue if the non-  
16 dispositive motions are denied. Currently, the Defendants have had difficulty in obtaining  
17 certain declarations. Defendants anticipate that these declarations will be obtained shortly.

18 17. At the present time the Court has personal jurisdiction over all defendants in this  
19 proceeding, except one. If a defendant acts inappropriately, the Court can use its inherent  
20 supervision powers to put a stop to such actions. The Plaintiff will thus not be inconvenienced  
21 whatsoever by granting this continuance. Moreover, the government will not be  
22 inconvenienced because any inconvenience objection has been waived due to the fact that the  
23 government chose to add the Defendants at such a late date in the proceedings.<sup>2</sup>

24 \_\_\_\_\_  
25 <sup>1</sup> The Government has already taken depositions and other discovery in the past.

26 <sup>2</sup> The Government could have filed a separate civil action for an injunction against the Moving  
27 Defendants but chose not to. Also, the Government is still seeking to serve Franklin Thomason  
28 alleged to be a principal and director of Optech Limited. The Court granted the Government's  
motion recently and required that Thomason be served by publication no later than October 20,

1           18.     The 90% Stock Loan transaction is actively being litigated by taxpayers in the  
2 Federal Courts. By granting a continuance, the Court will have the benefit of these decisions  
3 on the merits of the loan transaction. As stated above in ¶12, one state superior court has  
4 granted summary judgment holding all the loans in issue in this civil action were not the sales  
5 of securities but bona fide loans. Thus, the continuance would put the Court in a much more  
6 informed position and would not inconvenience the Court as the Court is double and triple  
7 booked through 2009 or any opposing party whatsoever as everyone is seeking more time,  
8 including the Plaintiff.

9           19.     Under the current deadlines, by the time the motions are decided the Defendants  
10 cannot amend any pleadings and could not conduct non-expert discovery at all before an  
11 answer is filed. Even more egregious, no discovery has been received from the Government  
12 other than the initial disclosure and, recently, a small part of the extensive discovery already  
13 produced to the other defendants – two of apparently eight digital discs containing documents.  
14 Indeed, Defendants understand from other parties in this case that the eight discs contain  
15 363,159 separate files. Some of these files are multiple-page files, including one file consisting  
16 of 692 pages. Defendants have not yet have an opportunity to analyze these documents, and  
17 again, to date, have only received two of the eight discs.

18           20.     Furthermore, the Defendants should be entitled to at least the same amount of  
19 time to perform discovery and trial preparation as the other defendants after evaluation of the  
20 massive materials to be delivered in the future. The other defendants in this action had  
21 approximately seven (7) extra months to react, conduct research, develop discovery, conduct  
22 interrogatories, and attend the many depositions conducted by the Government. The Moving  
23 Defendants should be allowed the same amount of time given to the other defendants to  
24 conduct discovery, perform research, and adequately prepare for trial.

25  
26  
27           2008. By the time publication is obtained and if Thomason answers, it will be closer to trial  
and all serious deadlines with respect to Thomason will have run.

21. Under the current facts, deadlines, and procedure, harm is not only great, but fatal with respect to defending the civil action.

22. Due process requires the Court to apply the Federal Rules of Civil Procedure and deadlines so that fundamental unfairness does not result. In the instant case, the denial of a continuance would be fundamentally unfair. The Moving Defendants do not have the same amount of time as the other defendants to make non-dispositive and dispositive motions, conduct investigations, conduct discovery, and prepare for trial as guaranteed by the FRCP. The other defendants have had seven (7) extra months to exercise their rights under the FRCP. The government has taken years of investigation and preparation, including using IRS administrative summons and other investigative tools.

23. Unfairness exists as well due to the fact that most of the major critical deadlines have or are about to run while the Moving Defendants are still in the pleading stage. Three of the imminent deadlines have run, including the ability to amend pleadings, designate experts and conduct discovery. Also, when the Defendants were joined as a party the government had already taken discovery.

24. Despite the efficient and diligent speed with which the Defendants are moving, a continuance is necessary because of the imminence of the current deadlines. This current situation is due to no fault of the Moving Defendants, but can only be attributed to the lateness with which the government chose to join the Defendants as a party and the continued enforcement of a schedule order treating the Moving Defendants as if they had been named and served under the original complaint.

25. The courts in conducting their proceedings are required to conduct them so that the courts are not infringing on the constitutional rights of the parties. The courts are also required to conduct their proceedings in a manner to avoid these types of constitutional issues.

1           26. By granting the continuance, the court would also avoid the situation of whether  
2 a civil injunction would deny the Defendants their constitutional right to a jury trial, which they  
3 are entitled to with respect to any civil penalty imposition.

4           27. A stipulation has been signed by the parties that extends the deadlines as  
5 follows:

- 6           a. The date to amend the pleading will be continued from June 5, 2008 to  
7 December 5, 2008.
- 8           b. The expert disclosure date will be continued from August 20, 2008 to  
9 December 20, 2008.
- 10          c. The non-expert discovery cut-off will be continued from September 3,  
11 2008 to January 3, 2009.
- 12          d. The expert discovery cut-off will be continued from October 1, 2008 to  
13 February 1, 2009.
- 14          e. The deadline to hear dispositive motions will be continued from  
15 November 19, 2008 to February 19, 2009.
- 16          f. This stipulation is without prejudice to any party's right to bring a  
17 motion for a further modification of the Court's case management and  
18 pretrial orders or for a continuance of the trial date.

19 This stipulation was rejected by the Court.

20           28. All parties acknowledge in the stipulation that written discovery has been much  
21 more extensive than had been anticipated and the parties need additional time to evaluate the  
22 various claims and defenses raised and to conduct additional necessary discovery. The  
23 stipulation points to the fact that the Plaintiff has produced eight (8) digital discs containing  
24 363,159 separate files. Some of these files are multi-page files, including one file consisting of  
25 692 pages. Furthermore, Discs 7 and 8, which contain a total of 105,743 separate files, were  
26 just recently produced on July 18, 2008. Again, only two of the eight discs have been provided  
27 to the Moving Defendants and Defendants have not yet had an opportunity to analyze any of  
28 the documents. The Moving Defendants would be unable to evaluate meaningfully the above  
documents and to conduct any necessary follow-up investigation and discovery under the



1 existing deadlines. The Moving Defendants are barred from taking affirmative discovery. The  
2 Moving Defendants wish to state their needs as clearly as possible.

3 Therefore, the Court should grant the extension of the deadlines by seven (7) months to  
4 give the Moving Defendants the same amount of time as the other parties, including future  
5 dispositive motions.

6  
7 I declare under penalty of perjury that the foregoing is true and correct.

8 Dated: September 4, 2008

9  
10 By /s/ Edward O.C. Ord  
Edward O.C. Ord

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 4, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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